83-927

No. A-246

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

ANHEUSER-~~BUSCH~~, INC.
~~UNITED STATES BREWERS ASSOCIATION, INC., et al.,~~
Appellants,

ABE RODRIGUEZ v.

~~JIM BACA~~, DIRECTOR OF THE NEW MEXICO DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW MEXICO

JURISDICTIONAL STATEMENT OF ANHEUSER-BUSCH, INC.

WILLIAM HUGHES MULLIGAN
Counsel of Record

Skadden, Arps, Slate,
Meagher & Flom
919 Third Avenue
New York, New York 10022
(212) 371-6000
Attorneys for Appellant
Anheuser-Busch, Inc.

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QUESTIONS PRESENTED

1. Does the Commerce Clause of the United States Constitution permit a state to require out-of-state manufacturers to sell their products to all wholesalers within the state at a price no higher than the lowest price at which such products were offered to any wholesaler in any other state or the District of Columbia during the preceding month, where the state does not offer, the record does not contain, and the courts below have not found that the statute furthers any legitimate state interests.

2. If such a statute is invalid under the Commerce Clause, is it nonetheless permitted by the Twenty-first Amendment merely because the product involved is beer?

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Appellee.

ON APPEAL FROM THE SUPREME COURT OF
THE STATE OF NEW MEXICO

JURISDICTIONAL STATEMENT

Appellant Anheuser-Busch, Inc. ("Anheuser-Busch")[1] appeals from the order and judgment of the Supreme Court of the State of New Mexico which affirmed the summary dismissal of a constitutional challenge to the 1979 amendments to N.M. Stat. Ann. §§ 60-12-2, 60-12-3, 60-12-6 and 60-12-8 of the New Mexico Discrimination in Selling Act (the "beer price affirma-

[1] Anheuser-Busch refers the Court to the Jurisdictional Statement filed on behalf of the United States Brewers Association, Inc., *et al.*, for a listing of all additional parties to the appeal. The statement required by Rule 28.1 of the Rules of the Supreme Court appears at page A-1 of the Appendix attached hereto.

tion provisions").[2] Under those provisions, the wholesale price which out-of-state brewers can charge for beer shipped into New Mexico is limited to a price no higher than the lowest price charged in any state outside New Mexico during the previous month. The New Mexico Supreme Court held that the statute did not violate either the Commerce Clause or the Supremacy Clause of the United States Constitution, art. I, § 8, cl. 3; art. VI, cl. 2.[3]

THE OPINIONS BELOW

The unreported opinion and order of the District Court for Santa Fe County, New Mexico, dated February 7, 1980, is reprinted at pages A-2 through A-6 of the Appendix. The opinion and order of the New Mexico Supreme Court dated July 21, 1983, which is reported at 668 P.2d 1093, is reprinted in the Appendix at pages A-11 through A-25,[4] respectively.

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[2] N.M. Stat. Ann. §§ 60-12-2, 60-12-3, 60-12-6 and 60-12-8. These sections are reprinted at pp. 4 through 6, *infra*. While this case was pending before the New Mexico Supreme Court, the New Mexico Legislature repealed, amended and recodified these sections, replacing them with a different price affirmation statute which became effective on July 1, 1981. Although the Supreme Court of New Mexico was aware of the amendments (as is indicated in footnotes 1 and 4 to the court's opinion), it did not rule on the validity of the new legislation, and the only statutory language addressed or cited in the body of the opinion was from the 1979 statute. Accordingly, Anheuser-Busch does not believe that the effect or validity of the newly enacted New Mexico price affirmation provisions are involved in this appeal, and unless otherwise indicated, all references to the beer price affirmation provisions are to the 1979 statute only. The question of the constitutionality of the 1979 statute is not moot because, as more fully set forth *infra* (fn. p. 8), New Mexico is seeking to recover sums of money against the brewers on the basis of their alleged violation of the 1979 statute. If the New Mexico Supreme Court opinion is interpreted as sustaining the 1981 legislation as well, Anheuser-Busch submits that the 1981 price affirmation provisions are also unconstitutional for the same reasons as set forth *infra* with respect to the 1979 legislation.

[3] The brewers also unsuccessfully challenged the beer price affirmation provisions as violative of several provisions of the New Mexico Constitution and the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Those claims are not before this Court on this appeal.

[4] Page references to the Appendix to this Jurisdictional Statement are cited as "A- ".

JURISDICTION

The Opinion and Order of the District Court for Santa Fe County, New Mexico which granted summary judgment declaring that the New Mexico beer price affirmation provisions did not violate the Commerce, Supremacy, Due Process or Equal Protection Clauses of the United States Constitution was entered on February 19, 1980. On appeal, the New Mexico Supreme Court affirmed. The order of that court was entered on July 21, 1983. Appellants filed a petition for rehearing on August 4, 1983, which was denied on August 25, 1983. On October 6, 1983, a Notice of Appeal to this Court was duly filed with the Clerk of the New Mexico Supreme Court in Santa Fe, New Mexico. The Notice of Appeal is reprinted at A-26 of the Appendix.

Jurisdiction is conferred upon this Court by 28 U.S.C. § 1257(2) to review a decision of the highest court of New Mexico where the validity of a state statute was challenged as being repugnant to the Constitution of the United States and the decision was in favor of its validity. On October 11, 1983, the Court, per Justice White, extended appellants' time to docket this appeal until November 21, 1983. Justice White's order is reprinted in the Appendix at A-28. On November 10, 1983, the Court further extended appellants' time to docket this appeal until December 5, 1983. A copy of that order appears at A-29.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTIONAL PROVISIONS

The Commerce Clause of the United States Constitution

> "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."
>
> U.S. Const. art. I, § 8, cl. 3.

The Twenty-First Amendment to the United States Constitution

"The transportation or importation into any state, territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

U.S. Const. amend. XXI, § 2

STATUTORY PROVISIONS

The Beer Price Affirmation Provisions of the New Mexico Discrimination in Selling Act

60-12-2. Filing of schedules required.

No brand of alcoholic liquor shall be sold to or purchased by a wholesaler, irrespective of the place of sale or delivery, unless a schedule is filed with the chief of the liquor control division [director of the department of alcoholic beverage control] and is then in effect. For the purposes of the Discrimination in Selling Act [60-12-1 to 60-12-10 NMSA 1978], "alcoholic liquor" means alcoholic liquors as defined in Section 60-3-1 NMSA 1978.

60-12-3. Form of schedule.

The schedule shall be in writing, duly verified and filed in the number of copies, form and time as required by the chief of the liquor control division [director of the department of alcoholic beverage control]. It shall contain, with respect to each item, the exact brand or trade name, capacity of package, nature of contents, age and proof where stated on the label, the number of bottles contained in each case, the bottle and case price to wholesalers, the net bottle and case price paid by the seller, which prices, in each instance, shall be individual for each item and not in combination with any other item, the discounts for quantity, if any, and the discounts for time of payment, if any.

60-12-6. Filing of affirmation.

There shall be filed in connection with, and when filed shall be deemed part of, the schedule filed for a brand of

alcoholic liquor, an affirmation duly verified by the owner of the brand of alcoholic liquor that the bottle and case price of alcoholic liquor to wholesalers set forth in the schedule is no higher than the lowest price at which such item of liquor was sold by the brand owner or any related person, to any wholesaler anywhere in any other state of the United States or in the District of Columbia, or to any state or state agency which owns and operates retail liquor stores, at any time during the calendar month immediately preceding the month in which the schedule is filed. As used in this section "related person" means any person:

A. in the business of which the brand owner has an interest, direct or indirect, by stock or other security ownership, as lender or lienor, or by interlocking directors or officers;

B. in the exclusive, principal or substantial business of selling a brand or brands of alcoholic liquor purchased from the brand owner; or

C. who has an exclusive franchise or contract to sell the brand or brands.

60-12-8. Determination of lowest price.

In determining the lowest price for which any item of alcoholic liquor was sold in any other state or in the District of Columbia, or to any state or state agency which owns and operates retail liquor stores, appropriate reductions shall be made to reflect all discounts in excess of those to be in effect under such schedule, and all rebates, free goods, allowances and other inducements of any kind whatsoever offered or given to any wholesaler, state or state agency or retailer, as the case may be, purchasing such item in the other state or in the District of Columbia; provided nothing contained in the Discrimination in Selling Act [60-12-1 to 60-12-10 NMSA 1978] shall prevent differentials in price which make only due allowance for differences in state taxes and fees, and in the actual cost of delivery. As used in this section, "state taxes and fees"

means the excise taxes imposed or the fees required by any state or the District of Columbia upon, or based upon, the gallon of liquor, and the term "gallon" means two hundred thirty-one cubic inches.

STATEMENT OF THE CASE

The issue raised in this appeal is whether, under the facts of this case, a state may constitutionally set a ceiling on the price of goods sold in interstate commerce by requiring that the price at which they may be sold in that state be no higher than the lowest price charged in any other state. The burdens such a statute places on interstate commerce are obvious on the face of the statute, and were raised in the courts below.[5] The record is totally devoid, however, of any attempt by appellee Director of the New Mexico Department of Alcoholic Beverage Control ("New Mexico") to offer any justification for the New Mexico statute. Nevertheless, the New Mexico Supreme Court affirmed the grant of summary judgment dismissing the brewers' constitutional challenge to this statute without any finding that the statute furthered legitimate state interests, apparently because, on the basis of this Court's decision in *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35, *reh'g denied*, 384 U.S. 967 (1966), it believed that since the commodity involved was beer, no Commerce Clause analysis or weighing of the relevant federal and state interests was required.

Anheuser-Busch submits that by summarily upholding the price affirmation provisions without weighing the federal interest in free interstate commerce against the state interests involved, if any, the New Mexico Supreme Court misconstrued *Seagram* and committed a serious error of law. It is now well established, in such recent precedents of this Court as *Califor-*

[5] The brewers made submissions, including affidavits, which illustrated the effects of the New Mexico beer price affirmation legislation on interstate commerce. These uncontroverted affidavits were part of the record before the New Mexico Supreme Court and will be a part of the record on appeal before this Court.

nia Retail Liquor Dealers Association v. Midcal Aluminum Inc., 445 U.S. 97 (1980), and *United States Brewers Association, Inc. v. Healy*, 692 F.2d 275 (2d Cir. 1982), *aff'd*, 52 U.S.L.W. 3308 (October 17, 1983), that when state legislation regulating the pricing of alcoholic beverages substantially interferes with or burdens interstate commerce, the Twenty-First Amendment is no bar to a constitutional challenge. Rather, the court *must* balance the respective federal and state interests. Since the New Mexico court failed to do this, and the statute cannot be sustained if subjected to such an analysis, plenary review of the judgment below is required.

PRIOR PROCEEDINGS

This action was filed on June 8, 1979 in the District Court for Santa Fe County, New Mexico, challenging, *inter alia*, the constitutionality of the 1979 amendments to the New Mexico Discrimination in Selling Act, N.M. Stat. Ann. §§ 60-12-1 through 60-12-10 (1978), which became effective on June 15, 1979. Those amendments required brewers selling beer to New Mexico wholesalers to affirm under oath that the price at which the brewer will offer its product during the succeeding month is no higher than the lowest price at which that brewer offered that same product anywhere in the United States during the preceding month. The plaintiffs in the trial court were the United States Brewers Association, Inc. ("U.S.B.A."), a national trade association of brewers, and seven individual brewers, including Anheuser-Busch (collectively referred to as "the brewers").

The brewers immediately moved for a preliminary injunction barring New Mexico from enforcing the beer price affirmation provisions, to which New Mexico consented. The district court issued the injunction but conditioned it upon each plaintiff-brewer's posting a bond for the difference between the price at which the brewer sold beer in New Mexico and the price at which it would have been required to sell the beer if the

price affirmation provisions were in effect. Anheuser-Busch and the other brewers filed such bonds.[6]

On November 17, 1979, while discovery was in an early stage, New Mexico moved for summary judgment. It neither presented facts nor made arguments supporting or even identifying any state interest furthered by the provisions. Nevertheless, on January 7, 1980 the district court granted New Mexico's motion for summary judgment and declared the statute constitutional. The court refused to make any inquiry into the burdens imposed on interstate commerce or the interests served by the legislation. Final judgment was entered on February 19, 1980.

On March 18, 1980, the brewers timely filed their notice of appeal to the Supreme Court of New Mexico. The appeal remained *sub judice* from that time until July 21, 1983 when the New Mexico Supreme Court affirmed the lower court's decision.[7]

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[6] New Mexico has repeatedly expressed its intention to collect the amounts owed by each brewer under the bonds and, in fact, has already begun discovery proceedings in order to determine those amounts. Anheuser-Busch does not concede that any amounts are owing under the bond it posted and expressly reserves its right to contest any such asserted liabilities. Nevertheless, New Mexico's threatened enforcement of the bonds, despite the repeal of the statutory provisions involved, presents a justiciable controversy with respect to the validity of the former beer price affirmation laws and the brewers' asserted liabilities under the bonds, and therefore this case is not moot. *Edgar v. Mite Corp.*, 457 U.S. 624 (1982).

[7] During the period that this case was pending before the New Mexico Supreme Court, the Second Circuit Court of Appeals invalidated a Connecticut beer price affirmation statute which had been passed after the New Mexico legislation. *United States Brewers Association, Inc. v. Healy*, 692 F.2d 275 (2d Cir. 1982). That decision has recently been affirmed by this Court, subsequent to the New Mexico Supreme Court's decision, *sub nom. Healy v. United States Brewers Association, Inc.*, 52 U.S.L.W. 3308 (October 17, 1983).

THE QUESTIONS RAISED ARE SUBSTANTIAL

The questions presented in this appeal are substantial, meriting, at the least, full briefing and argument in this Court, or perhaps summary reversal in light of prior recent rulings of this Court. What is at issue is not only potential direct monetary liability, but also the preservation of free and competitive pricing among the states in the sale of beer and other alcoholic beverages.

The New Mexico Supreme Court was able to sustain the legislation involved in this action only by misconstruing or ignoring controlling decisions of this Court, including *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980); *Edgar v. Mite Corp.*, 457 U.S. 624 (1982); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935); and *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35, *reh'g denied*, 384 U.S. 967 (1966). Specifically, the New Mexico Supreme Court erroneously interpreted *Seagram* as precluding Commerce Clause analysis of legislation such as the beer price affirmation provisions. As will be demonstrated, *Seagram* neither bars nor eliminates the duty of courts to make such an analysis. Indeed, in *Seagram* this Court balanced the relevant state and federal interests and concluded that, on the unique and unusual facts of that case, the state interests furthered by the New York liquor affirmation law were sufficiently compelling to justify the burdens on interstate commerce imposed by that legislation. In contrast, New Mexico has offered and the New Mexico courts have identified no justification for the beer price affirmation provisions despite their obvious extraterritorial burdens.

Affirmance of the New Mexico Supreme Court's decision would create grave doubts and confusion as to the proper application of the Commerce Clause to state regulation of alcoholic beverage pricing and would probably lead to the adoption by other states of statutes modeled on New Mexico's. This would, in itself, be disastrous, since enactment of this

statute by two or more states would fix *permanent* ceilings on beer prices in those states, making it impossible to ever raise them. Clearly, this was not the result intended by the Court in *Seagram* and is contrary to a long line of Commerce Clause decisions both prior to and subsequent to *Seagram.*

POINT I

THE NEW MEXICO PRICE AFFIRMATION PROVISIONS IMPERMISSIBLY BURDEN INTERSTATE COMMERCE

There is no doubt that the regulatory scheme New Mexico seeks to impose through the beer price affirmation provisions constitutes, at least in the absence of a strong state interest, an impermissible regulation of interstate commerce under the Commerce Clause. Not only does it fix the price every out-of-state brewer[8] can charge in New Mexico for the following month, but it does so by tying that price to the lowest price charged in Arizona, Colorado or any other state. In other words, when a brewer establishes its prices in Arizona, it must take into account that it is also setting the maximum price at which it can sell beer in New Mexico in the succeeding month. Thus, the affirmation provisions burden and restrict the brewers' pricing decisions in all states, precisely the kind of out-of-state burden condemned in such cases as *Baldwin v. G.A.F. Seelig, Inc., supra,* and *Edgar v. Mite Corp., supra.*

These effects of the New Mexico price affirmation provisions are beyond dispute, since they follow directly and inevitably from the language of the statute as construed by the New Mexico Supreme Court. Sections 60-12-2 and 60-12-3, and the regulation promulgated thereunder,[9] require that on the last day of the month, each brewer must file with the director of the department of alcoholic beverage control a schedule of prices at which it will sell beer in New Mexico for the following month.

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[8] There are no brewers located in New Mexico.

[9] N. M. Dep't of Alcoholic Bev. Control Reg. No. 20 (3) (1976).

Along with that schedule, the brewer must file a verified affirmation that:

> the bottle and case price of [beer] to wholesalers set forth in the schedule is no higher than the lowest price at which such item of liquor was sold by the brand owner . . . to any wholesaler anywhere in any other state of the United States or in the District of Columbia . . . at any time during the calendar month immediately preceding the month in which the schedule is filed.

N.M. Stat. Ann. § 60-12-6 (1978)[10]

As the New Mexico Supreme Court found, the affirmation law prevents a brewer from selling its products in New Mexico unless the price at which it offers those products is lower than or equal to the lowest price offered by the brewer in any other state or the District of Columbia during the previous month. (A-13) If a brewer wishes to charge a lower competitive price to even a single wholesaler in Arizona or any state outside New Mexico, it is constrained from doing so under the affirmation provisions because it would then have to lower its prices throughout New Mexico for the following month.

A. The Provisions Impermissibly Burden Interstate Commerce

A very similar price fixing regulation for milk was invalidated by this Court as early as 1935. *Baldwin v. G.A.F. Seelig, Inc., supra,* 294 U.S. 511. In *Baldwin,* New York attempted to require milk processors in New York to enter an agreement with the state promising that if they purchased milk from producers outside New York, they would pay a price no lower than the price charged by New York producers for similar milk. The Court found that the regulatory scheme ran afoul of the Commerce Clause stating: "New York has no power to project its legislation into Vermont by regulating the

[10] In determining the lowest price for beer in any other state, the brewer must make appropriate reductions in the price for any discounts, rebates, free goods, or other promotional allowances offered in any other state. N.M. Stat. Ann. § 60-12-8.

price to be paid in that state for milk acquired there." 294 U.S. at 521.

In the same way the legislation in *Baldwin* sought to eliminate any potential price advantage Vermont producers might have by tying the price at which Vermont milk was purchased to the New York price, the beer price affirmation provisions seek to eliminate any potential price advantage Arizona or any non-New Mexico wholesalers might have by tying the price at which beer is sold in other states to the New Mexico price.

Indeed, the New Mexico statute constitutes an even more egregious attempt to regulate commerce beyond the state's borders than the New York statute invalidated in *Baldwin*. The transactions burdened by New York were sales by Vermont producers to New York processors, and thus had at least some nexus with New York. New Mexico, in contrast, has chosen to restrict transactions occurring completely outside its borders between out-of-state brewers and out-of-state wholesalers. As recently as last year in *Edgar v. Mite Corp., supra,* 457 U.S. 624, this Court reaffirmed the principle that, absent compelling justification, a state may not interfere with or regulate any activity occurring outside of its boundaries. *Accord United States Brewers Association, Inc., v. Healy, supra,* 692 F.2d 275, *aff'd,* 52 U.S.L.W. 3308 (Connecticut beer price affirmation legislation impermissibly regulated out-of-state activity.)

The New Mexico legislation is far more invidious than the New York milk legislation condemned in *Baldwin* or the Connecticut beer affirmation provisions stricken in *Healy* for an additional reason. Under the New Mexico statute, which ties the affirmation to the lowest price charged in any state for the *preceding* month, if more than one state adopts such legislation (which is highly likely if the constitutionality of the New Mexico statute is affirmed by this Court), the statute would make it impossible for brewers *ever again to raise prices in those states under any circumstances.*[11]

[11] Assume that states X and Y enact such retrospective affirmation legislation. In state Z, by contrast, prices are freely set and wholesalers, for competitive reasons, receive the lowest price per case of beer—$4.50. Once a

If one more state were to enact legislation like New Mexico's, there immediately would be created for each brewer selling beer in those states a maximum ceiling price above which it could never raise prices. Furthermore, the interaction of the affirmation laws would create a "lock-step" pricing arrangement where a reduction in one state would have to be reflected in the other affirmation states during the next month and would then become a new ceiling price for all such states during the third month.[12]

New Mexico-type statute goes into effect in states X and Y, price affirmations must be filed on January 31 setting forth their price for February and for each succeeding month thereafter. That schedule must affirm that the February prices will be no higher than the lowest price charged in any state during December (the month preceding the month in which the schedule is filed). The inevitable effect of such statutes would be as follows:

Table 1

	State X	State Y	State Z (Freely Set)	
Dec.	$5.00	$4.75	$4.50	
Jan.	5.00	4.75	4.50	
Feb.	4.50	4.50	4.75	(affirmations in effect in States X and Y.)
Mar.	4.50	4.50	4.25	
Apr.	4.50	4.50	4.25	
May	4.25	4.25	4.50	

As Table 1 illustrates, during December, free market conditions prevailed leading to different, competitively set prices in the three states. Pursuant to the affirmation laws, however, the February prices (filed January 31) in X and Y must uniformly drop to $4.50—the lowest price offered during the *month preceding the filing* (in Z). Even if competitive conditions change during February, and the freely set price in state Z rises to $4.75, April prices in X and Y must remain at or below $4.50. At this point, the affirmation statutes in X and Y have interacted so that $4.50 has now become a *maximum ceiling price* above which the brewers may never go without violating the affirmation laws. Furthermore, as Table 1 illustrates, if the price in a non-affirmation state (Z) competitively drops during March, even temporarily, that lower price becomes a new ceiling price for states X and Y beginning in May.

[12] Enactment of the Connecticut affirmation statute invalidated in *Healy, supra*, by many states would have resulted in uniform prices in those states each month. A brewer, however, would have maintained the freedom competitively to raise prices (across-the-board) every month depending upon overall market conditions.

It is well established that in analyzing for Commerce Clause purposes legislation enacted by one state, the Court considers the damaging effects which would result if other states were permitted to enact the same or similar statutes. *City of Burbank v. Lockheed Air Terminal*, 411 U.S. 627 (1973) (Court considered the balkanization of air travel which would result if other states enacted the same legislation); *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945) (Court considered burdens on interstate railroads if each state were permitted to regulate train lengths).

In this case, adoption of the New Mexico legislation by other states would completely eliminate pricing flexibility and free competition in the beer industry and result in nationwide price uniformity and rigidity. In short, it would result in precisely those evils the Commerce Clause exists to prevent.

B. New Mexico Did Not Offer And The Courts Below Did Not Find Any Interest Furthered By The Provisions

The New Mexico beer price affirmation provisions thus create direct and unavoidable burdens on transactions occurring in other states. Once such a burden upon interstate commerce is established, the state must prove that the regulation is justified by legitimate state interests. *Hughes v. Oklahoma*, 441 U.S. 322 (1979).[13] This neither the state nor the New Mexico courts have even attempted to do.

There is not a scintilla of support in the record for any state interest, let alone a legitimate state interest, which would be fostered by the New Mexico beer price affirmation provisions.

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[13] Against the legislation's burdens, the legitimate state interests advanced by the statute must be balanced. As stated by the Court in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970):

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits . . . . If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

The state has not pointed to any monopolistic practices as did New York in *Joseph E. Seagram & Sons, Inc. v. Hostetter, supra,* 384 U.S. 35,[14] or Maryland in *Exxon Corp. v. Governor of Maryland,* 437 U.S. 117, *reh'g denied,* 439 U.S. 884 (1978).[15] Nor has the state raised a health interest as New York tried unsuccessfully to do in *Baldwin v. G.A.F. Seelig, Inc., supra,* or economic welfare as Illinois attempted in *Edgar v. Mite Corp., supra.* Moreover, the New Mexico Supreme Court did not even hypothesize any interests which might be sufficient to sustain the constitutionality of the statutes.

New Mexico's failure to offer a justification for such a statute is understandable—no legitimate justification exists. As the Court stated in *Edgar v. Mite Corp., supra,* 457 U.S. at 644, "[i]nsofar as the [legislation] burdens out-of-state transactions, there is nothing to be weighed in the balance to sustain the law."

POINT II

THE NEW MEXICO PRICE AFFIRMATION PROVISIONS ARE NOT PROTECTED FROM COMMERCE CLAUSE REVIEW BY THE TWENTY-FIRST AMENDMENT

As demonstrated above, under the standards previously established by this Court, the New Mexico statute violates the Commerce Clause. Yet the New Mexico Supreme Court not only upheld the statute, but did so without applying any Commerce Clause analysis whatsoever, apparently on the mistaken belief that, because the commodity involved is beer, the Twenty-First Amendment and this Court's prior decision in

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[14] A full analysis of the Court's decision in *Joseph E. Seagram & Sons, Inc. v. Hostetter* appears in Point II, *infra.*

[15] *Exxon* is also distinguishable from the instant appeal on more fundamental grounds. The Court held that the legislation challenged in *Exxon* regulated only in-state activities and prices without reference to out-of-state activities or prices. Accordingly, the Maryland statute burdened only intrastate and not interstate commerce.

Joseph E. Seagram & Sons, Inc. v. Hostetter, supra, 384 U.S. 35, insulated the statute from any Commerce Clause challenge.

Seagram, however, did not give *carte blanche* approval to price affirmation schemes, as the New Mexico Supreme Court apparently believed, but rather sustained such a statute under an extreme and unique set of circumstances. The Court recognized that price affirmation was a "drastic" form of legislation. 384 U.S. at 48. Nevertheless, on the facts presented in *Seagram,*[16] the Court found that the statute was constitutionally justified by the state's strong interest in breaking the monopolistic and discriminatory grip of the liquor distillers within the state: "[O]nly by imposing the relatively drastic 'no higher than the lowest price' requirement . . . could the grip of the liquor distillers on New York liquor prices be loosened." 384 U.S. at 48 (citations omitted).

Thus, *Seagram,* like *California Retail Liquor Dealers Association, Inc. v. Midcal Aluminum, Inc., supra,* 445 U.S. 97, where this Court invalidated a California wine price maintenance statute as violative of the Sherman Act, represents a balancing of federal and state interests with regard to the specific regulation at issue. Under the unique factual situation in *Seagram,* where the "drastic" step of price affirmation was the "only" method of achieving important state purposes, such regulation was arguably justified. But *Seagram* certainly does not stand for the proposition, erroneously adopted by the court below, that any statute which simply tracks the language of the statute found valid in *Seagram* is automatically constitutional. Indeed, given the fact that the adoption of *Seagram*-type statutes by other states would result in permanent price ceilings as explained *supra* pp. 12-13, it is inconceivable that this Court intended to sustain the constitutionality of such statutes in the absence of special circumstances of the type which confronted New York.

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[16] The record before the Court in *Seagram* contained extensive documentation of the Moreland Commission hearings and reports which had found that "New York liquor consumers had been the victims of serious discrimination," 384 U.S. at 39, to such an extent that "New Yorkers were subsidizing the liquor industry by $150,000,000 a year." *Id.* at n. 9.

In refusing to consider the effect of the affirmation provisions on interstate commerce, the New Mexico Supreme Court concluded erroneously that states are unconfined by Commerce Clause limitations when they fix the price of beer imported for distribution and consumption within their borders.[17] Subsequent decisions of this Court confirm the New Mexico Supreme Court's misreading of *Seagram*. As the Court recently emphasized in *Midcal*, statutes governing pricing of alcoholic beverages must be subjected to a balancing of the federal pro-competition interests against the interests sought to be advanced by the state. 445 U.S. at 110. *Midcal* held that the state's interests identified by the lower courts—the promotion of temperance and the protection of small retail establishments—were unsubstantiated by the record and in any event were far outweighed by the "familiar and substantial" federal interest in favor of competition, and held the statute invalid.[18] *See also United States Brewers Association, Inc. v. Healy, supra.*

There can be no doubt, in light of *Midcal*, that the New Mexico Supreme Court erred by declaring the New Mexico pricing statute constitutional without balancing the relevant federal and state interests. Such a balancing test would have had to take into account the severe and inevitable restrictions this statute imposes on interstate commerce and the lock-step

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[17] This Court has repeatedly held that while the Twenty-First Amendment provides substantial protection for state regulation of the *importation* and *distribution* of alcoholic beverages, there is no such Commerce Clause exemption for legislation like the New Mexico statute, which seeks merely to control the *pricing* of that commodity.

> Both the Twenty-first Amendment and the Commerce Clause are parts of the same constitution. Like other provisions of the constitution, each must be considered in light of the other, and in the context of the issues and interests at stake in any concrete case.

Hostetter v. Idlewild Liquor Corp., supra, 377 U.S. at 331-32. *Accord, California Retail Liquor Dealers Association v. Midcal Aluminum, Inc., supra*, 445 U.S. at 109.

[18] Indeed, the Court impliedly questioned "whether the legitimate state interests in temperance and the protection of small retailers *ever* could prevail over the undoubted federal interest in a competitive economy." 445 U.S. at 113-14 (emphasis added).

price ceilings that would ineluctably follow. Against these powerful federal interests in free trade and competition, New Mexico offered no state interest whatsoever.[19] In short, this statute cannot withstand the balancing test to which it should have been subjected under *Midcal*.

The New Mexico Supreme Court's refusal to apply a *Midcal* balancing test to this case on the grounds that it is not sufficiently "concrete" (A-19) simply makes no sense. There is no doubt that this dispute, which involves a statute enacted by the New Mexico legislature that is being enforced against appellants, presented a live "case or controversy"[20] The lower court erroneously assumed that no "concrete" burdens could be shown in this case because the statute never went into effect.[21] But this Court has struck down statutes as unconstitutional on many occasions based on the impact upon commerce that will flow from operation of the statutes without waiting for the harm to have actually occurred. Indeed, the Court has often considered the undeniable impact on commerce of state statutes even where, unlike here, those statutes had not yet been enforced. *E.g. City of Burbank v. Lockheed Air Terminal, supra,* 411 U.S. 624; *Bibb v. Navajo Freight Lines,* 359 U.S. 529 (1959); *Southern Pacific Co. v. Arizona, supra,* 325 U.S. 761.[22]

In this case, the statute will inevitably restrict pricing decisions in other states in the most severe manner. These

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[19] Only those non-illusory interests considered by the state legislature should be considered by this Court in applying the balancing test. *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 670 (1980). In any event, even if the New Mexico Supreme Court were free to consider interests not contemplated by the New Mexico Legislature, *compare Kassel, supra* at 681 (Brennan, J. concurring), with *Id.* at 703-04 (Rehnquist, J. dissenting), here it failed to consider or find any state interest.

[20] If the New Mexico Supreme Court believed this action did not constitute a "case or controversy" it should not have affirmed the constitutionality of the statute but rather dismissed the appeal with orders to vacate the decision below for lack of subject matter jurisdiction. *Cf: Longshoreman's Union v. Boyd,* 347 U.S. 222, 223 (1954).

[21] The New Mexico Supreme Court ignored the fact that because the 1979 price affirmation provisions were no longer in existence at the time of its decision, this case is as "concrete" as it will ever be.

[22] In *Healy*, a beer price affirmation statute was struck down although the record contained no evidence of the actual effect of the statute, because by its terms the statute imposed severe burdens on interstate commerce.

burdens should have been considered by the court below without waiting for appellants and interstate commerce to actually suffer the harm they would impose.[23]

CONCLUSION

Based upon the foregoing, the questions presented for review are substantial. Anheuser-Busch respectfully submits that this Court should note probable jurisdiction or summarily reverse in light of prior rulings of this Court.

Respectfully submitted,

WILLIAM HUGHES MULLIGAN

Attorney for Appellant
Anheuser-Busch, Inc.

Of Counsel,

JEFFREY GLEKEL
TIMOTHY G. REYNOLDS
Skadden, Arps, Slate,
Meagher & Flom
919 Third Avenue
New York, New York 10022
(212) 371-6000

CHARLES M. YABLON
Benjamin Cardozo School of Law
55 Fifth Avenue
New York, New York

December 5, 1983

[23] The New Mexico Supreme Court misunderstood the statement in *Midcal* that conflicting federal and state policies must be balanced in a "concrete" case. That statement simply followed from the Court's observation that no single rule of general application could be formulated for all cases, but that conflicting federal and state interests had to be balanced on the facts of each particular situation, *i.e.* each "concrete case". The New Mexico court apparently misconstrued this comment to require some special sort of "concreteness" in such cases. Yet such a requirement cannot be found in *Midcal*, is illogical and is inconsistent with the numerous cases, including cases involving the regulation of alcoholic beverages, *e.g.*, *Hostetter v. Idlewild Liquor Corp.*, *supra*, 377 U.S. 324, where statutes have been struck down as unconstitutional on their face.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. A-246

UNITED STATES BREWERS ASSOCIATION, INC., *et al.*,
Appellants,

v.

JIM BACA, DIRECTOR OF THE NEW MEXICO
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF
THE STATE OF NEW MEXICO

APPENDIX TO THE JURISDICTIONAL STATEMENT OF ANHEUSER-BUSCH, INC.

Listing Required by Rule 28.1 of Appellees and Their Parent Companies, Subsidiaries (Except Wholly-Owned Subsidiaries) and Affiliates

Anheuser-Busch, Inc.

Parent—Anheuser-Busch Companies, Inc.

Subsidiaries and Affiliates—St. Louis National Baseball Club, Inc.; Busch Properties, Inc.; Consolidated Farms, Inc.; Metal Container Corporation; Kingsmill Realty, Inc.; St. Louis Refrigerator Car Company; Manufacturer's Railway Co.; Manufacturer's Cartage Co.; M.R.S. Redevelopment Corporation; M.R.S. Transport Company; Williamsburg Transport, Inc.; Fairfield Transport, Inc.; Busch Entertainment Corp.; Kingsmill Resorts, Inc.; Container Recovery Corporation; Metal Label Corporation; International Label Company; Busch Creative Services Corporation; Sesame Place, Inc.; Anheuser-Busch International Finance N.V.; Carolina Peanuts of Robersonville, Inc.; Golden Eagle Distributing Co.; Busch Agricultural Resources, Inc.; Busch Industrial Products Corporation; Anheuser-Busch International, Inc.; Anheuser-Busch Europe, Inc.; AB Subsidiary, Inc.

IN THE DISTRICT COURT
OF THE FIRST JUDICIAL DISTRICT

STATE OF NEW MEXICO
COUNTY OF SANTA FE

UNITED STATES BREWERS ASSOCIATION, INC., ADOLPH COORS COMPANY, JOS. SCHLITZ BREWING COMPANY, ANHEUSER-BUSCH, INC., MILLER BREWING COMPANY, OLYMPIA BREWING COMPANY, G. HEILEMAN BREWING COMPANY, and PABST BREWING COMPANY,

Plaintiffs, NO. 79-1139

vs.

JIM BACA, Director of the New Mexico Department of Alcoholic Beverage Control,

Defendant.

MEMORANDUM OPINION

The issues before the Court raise significant legal questions, not factual ones. Summary judgment is proper when the pleadings and evidence in form of depositions, admissions, affidavits and documents attached to affidavits show that there is no genuine issue of material fact and that the moving party is entitled to summary judgment as a matter of law.

Plaintiffs filed suit seeking injunctive relief and a declaratory judgment that House Bill 278, (§ 60-12-2 N.M.S.A.) is violative of constitutional provisions which require that the subject of a bill be expressed in its title. Further, it is alleged

that the statute is vague and ambiguous. Plaintiffs urge that the entire "price fixing scheme" be set aside because it is arbitrary and not reasonably related to a proper legislative purpose. Plaintiffs contend that the statute violates due process, equal protection and the supremacy clause of the U.S. Constitution, and finally, Plaintiffs contend that enforcement of the law will place an impermissible burden on interstate commerce.

New Mexico has for some years maintained a prior affirmation law which required purchasers of spiritous liquor to file with the Department of Alcohol Beverage Control an affirmation that the prices of the products sold to New Mexico Wholesalers are no greater than the prices charged any other wholesaler in the United States. Prior to the 1979 legislative session, this law applied only to producers of "spiritous liquor" which by statutory definition, meant all alcoholic liquor except beer, wine and ale.

During the most recent session, House Bill 278 was introduced. This bill was captioned: Relating To Alcoholic Liquors Amending The Discrimination in Selling Act.

The bill deleted the term "spiritous liquor" and inserted in lieu thereof, the term "alcoholic liquor." The effect of this amendment was to broaden the applicability of the law from spiritous liquor to all alcoholic liquor, and thereby require producers of beer, wine and ale to comply with the affirmation procedures.

Plaintiffs contend that neither the legislature nor the public had proper notice of the bill's intent. The crux of the question is whether the subject of the bill was sufficiently expressed in the title so as to meet constitutional requirements.

As early as 1913 our Supreme Court determined the test to be applied in scrutinizing alleged violations of Article IV, Section 16. The test is simple. Does the title give reasonable notice of the subject matter of the statute? The question is not whether any particular person received actual notice, or whether any particular person had a clear understanding of the proposed law, but only whether the title gave reasonable notice.

House Bill 278's title states that it relates to alcoholic liquors; the title indicates that amendments to the Discrimination in Selling Act are sought. The title is not ambiguous; it specifically gives notice that it relates to alcoholic liquor. The title is not so limited that one would be mislead. The amendment in the bill accomplishes what the title announced; the Discrimination in Selling Act is amended by removing the term "spiritous liquor" and inserting "alcoholic liquor." The title meets constitutional standards and gives fair and reasonable notice of its subject. Accordingly, it is immaterial that Plaintiffs or individual legislators failed to receive actual notice. (Note: the Court will not consider the sections of Plaintiff's affidavits that would have been inadmissible in evidence at a trial). The standard is one of reasonableness, and the failure of specific individuals to take notice does not overcome the presumption of constitutionality.

Plaintiffs challenge the law by asserting that the legislature passed House Bill 278 without a clear understanding of its import or effect on liquor producers nationwide. Plaintiffs state that this is bad legislation, and attempts to pass such laws have been defeated elsewhere. It is alleged that the bill provides no substantial benefit to consumers, and in fact, may be to their detrament [sic].

These arguments should properly have been raised in public debate on the bill. The basis of our government, stated Thomas Jefferson, is the opinion of the people. That opinion should be made known to those considering the enactment of our laws, and the proper forum to raise the issues noted by Plaintiffs was in the legislature.

The Court will not substitute its judgment for the collective wisdom of the legislature in determining whether specific laws are needed or are ill-advised. As elected representative of the citizenry, the legislature enacts laws that are believed necessary and repeals those that are not. In a democratic society, legislative decisions should reflect the views of the majority. It is presumed that this law reflects the will of the people. While courts do not substitute their economic and social beliefs for the

legislature's courts will interpret laws passed to determine whether they are constitutionally sound.

Plaintiffs challenge the soundness of the law by asserting that the "price fixing scheme" contemplated by the statute is an impermissible use of the state's power.

In December of 1933 the Twenty-First Amendment to the United States Connstitution [sic] was ratified. This amendment gives states power to control the delivery and usage of alcoholic liquors. Pursuant to that authority states have exercised broad police powers in regulating the production, sales and consumption of alcohol. In *Drink, Inc. vs. Babcock*; 77 N.M. 227, 421 P.2d 798, our court stated:

> "We recognize that the legislature has the power not only to regulate the sale of alcoholic beverages, but to surpress it entirely, and may impose on the liquor industry more stringent regulations than on other businesses."

The Court pointed out that regulation of business interests, even in those areas where the state has broad authority, is limited by constitutional guarantees.

Inasmuch as this Court has already determined that the House Bill was constitutional on its face, and further, that the State can properly regulate this industry in the exercise of its police power, the inquiry turns to the question of whether constitutional guarantees have been violated.

Each of the constitutional arguments that have been raised by the Plaintiffs were previously argued to the United States Supreme Court following New York's enactment of a substantially similar price affirmation law. In *Joseph E. Seagram & Sons vs. Hostetter*, 384 U.S. 35, 16 L.Ed. 2d 236, the Court considered and rejected the arguments raised by the Plaintiff *Seagram*, and noting that the case at bar is in the same posture as the *Hostetter* case, there is no cause to depart from the analysis made by the U.S. Supreme Court. The Supreme Court found that New York's laws which would allegedly interfere

with Plaintiff's pricing policies in other states was not sufficient to invalidate the pricing scheme. Such laws were found to constitute a reasonable exercise of a State's rights under the Twenty-First Amendment. Similarly, the Court considered and rejected the claim that the state's law conflicted with federal statutes, or with the Supremacy clause. The Court determined that the enactment and enforcement of New York's law violated neither due process nor equal protection.

Plaintiffs finally urge the Court to declare the price affirmation law void, alleging that it is ambiguous and vague. The argument revolves around the use of terms which traditionally have no application to beer.

Defendants affidavits show that no problems have been encountered by other producers in completing affirmation schedules, and that those terms that have no application to beer and ale have simply been designated as "not applicable." The Court does not find ambiguity or vagueness that would compel the grant of relief prayed for by Plaintiffs.

Having determined that those issues are legal rather than factual, and determining that this is an appropriate case for the issuance of summary relief. The Court grants summary judgment to the Defendant.

LET JUDGMENT BE ENTERED ACCORDINGLY.

District Judge

IN THE DISTRICT COURT

STATE OF NEW MEXICO
COUNTY OF SANTA FE

UNITED STATES BREWERS ASSOCIATION, INC., ADOLPH COORS COMPANY, JOS. SCHLITZ BREWING COMPANY, ANHEUSER-BUSCH, INC., MILLER BREWING COMPANY, OLYMPIA BREWING COMPANY, G. HEILEMAN BREWING COMPANY, and PABST BREWING COMPANY,

Plaintiffs,

and

No. SF 79-1139

THE GUINNESS-HARP CORPORATION,

Plaintiff-in-Intervention,

vs.

JIM BACA, Director of the New Mexico Department of Alcoholic Beverage Control,

Defendant.

JUDGMENT AND ORDER

This Court, having heard this matter on the Defendant's Motion for Summary Judgment and having entered its Memorandum Opinion, enters its Judgment, hereby granting Summary Judgment to the Defendant, and dismissing Plaintiff and Plaintiff-in-Intervention's Complaints and dissolving the Preliminary Injunction previously entered, subject to the following decretal provisions.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that pursuant to Rule 62(c) of the Rules of Civil Procedure for the District Courts of the State of New Mexico, and to the stipulation of the parties contained herein, the Defendant, James R. Baca, Director of the New Mexico Department of Alcoholic Beverage Control, his agents, servants, employees and attorneys, be, and they hereby are restrained and enjoined, pending a final determination of Plaintiffs' and Plaintiff-in-Intervention's appeal from this Judgment, from enforcing against Plaintiffs and Plaintiff-in-Intervention the provisions of §§ 60-12-1, et seq. N.M.S.A. 1978, insofar as said statutes relate to pricing of brewed products sold by Plaintiffs and Plaintiff-in-Intervention in New Mexico. A final determination of the appeal means the entry of judgment by the District Court on the mandate of the Supreme Court of New Mexico,

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Preliminary Injunction bonds entered by Plaintiffs and Plaintiff-in-Intervention pursuant to this Court's Order of June 8, 1979, shall continue in effect during the pendency of the appeal, subject to the same terms and conditions as are set forth therein, as Supersedeas bonds pursuant to Rule 62(c) and (d).

_____

District Judge

IN THE DISTRICT COURT

STATE OF NEW MEXICO
COUNTY OF SANTA FE

UNITED STATES BREWERS ASSOCIATION, INC., ADOLPH COORS COMPANY, JOS. SCHLITZ BREWING COMPANY, ANHEUSER-BUSCH, INC., MILLER BREWING COMPANY, OLYMPIA BREWING COMPANY, G. HEILEMAN BREWING COMPANY, AND PABST BREWING COMPANY.

Plaintiffs,

and

THE GUINNESS-HARP CORPORATION,

Plaintiff-in-Intervention,

vs.

JIM BACA, Director of the New Mexico Department of Alcoholic Beverage Control,

Defendant.

No. SF 79-1139

NOTICE OF APPEAL

COMES NOW Plaintiffs United States Brewers Association, Inc., Adolph Coors Company, Jos. Schlitz Brewing Company, Anheuser-Busch, Inc., Olympia Brewing Company, G. Heileman Brewing Company, Pabst Brewing Company and Plaintiff-in-Intervention, the Guinness-Harp Corporation, by and through their attorneys, Freedman, Boyd & Daniels, and

hereby appeal from the Judgment and Order entered against them on February 19, 1980.

FREEDMAN, BOYD & DANIELS

By s// CHARLES W. DANIELS

Attorneys for Plaintiffs

U.S. Brewers Assoc., Adolph Coors Co., Jos. Schlitz Brewing Co., Anheuser-Busch, Inc., Olympia Brewing Co., G. Heileman Brewing Co., Pabst Brewing Co., and *Plaintiff-in-Intervention* Guinness-Harp Corp.
505 Roma, Northwest
Albuquerque,
New Mexico 87102
Telephone: (505) 842-9960

We hereby certify that we have mailed a copy of the foregoing to opposing counsel of record this day of March, 1980.

FREEDMAN, BOYD & DANIELS

By s// CHARLES W. DANIELS

IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO

UNITED STATES BREWERS ASSOCIATION, INC., ADOLPH COORS COMPANY, STROH BREWERY COMPANY, F & M SCHAEFER BREWING COMPANY, ANHEUSER-BUSCH, INC., MILLER BREWING COMPANY, OLYMPIA BREWING COMPANY, G. HEILEMAN BREWING COMPANY and PABST BREWING COMPANY,

Plaintiffs-Appellants,

and

No. 13,053

THE GUINNESS-HARP CORPORATION,

Plaintiff-in-Intervention-Appellant,

vs.

DIRECTOR OF THE NEW MEXICO DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,

Defendant-Appellee.

APPEAL FROM THE DISTRICT COURT
OF SANTA FE COUNTY

LORENZO F. GARCIA, District Judge

RODEY, DICKASON, SLOAN, AKIN & ROBB, P.A.
William S. Dixon
Albuquerque, New Mexico

FREEDMAN, BOYD & DANIELS
Charles W. Daniels
Albuquerque, New Mexico

for Appellants

Paul Bardacke, *Attorney General*
Arthur J. Waskey
Herbert M. Silverberg, *Assistant Attorney General*
Santa Fe, New Mexico

for Appellee

OPINION

RIORDAN, Justice.

United States Brewers Association, Inc., Adolph Coors Company, Joseph Schlitz Brewing Company, Anheuser-Busch, Inc., Miller Brewing Company, Olympia Brewing Company, G. Heileman Brewing Company and Pabst Brewing Company (Brewers) filed a declaratory action against the Director of the New Mexico Department of Alcoholic Beverage Control (Director), in which Guiness-Harp Corporation intervened, challenging the constitutionality of the 1979 amendment to the Discrimination in Selling Act, NMSA 1978, Sections 60-12-1 through 60-12-10 (Act).[1] Upon motion, the trial court granted Brewers a preliminary injunction against the enforcement of the Act on the condition that they execute bonds, binding themselves to pay the difference between the prices at which the products were sold during the pendency of the injunction and the prices at which the Act would have required them to be sold under the Act. Director filed a motion for summary judgment which was opposed by Brewers, who filed counter-affidavits to the motion. Director's motion for summary judgment was granted. Brewers appeal. We affirm and remand.

The issues on appeal are:

I. Whether the 1979 amendment to the Act was unconstitutional for failure to properly contain the subject of the 1979 amendment in the title of the Act.

II. Whether the Act imposes an undue burden on interstate commerce.

III. Whether the Act requires price-fixing that is unlawful under federal antitrust laws.

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1. The Act has since been repealed, amended, re-codified and is included in the Liquor Control Act, NMSA 1978, Sections 7-9-80.1, 7-17-5, 7-24-1, 60-3A-1 through 60-3A-5, 60-4B-1 through 60-4B-8, 60-4C-1 through 60-4C-3, 60-5A-1, 60-5A-2, 60-6A-1 through 60-6A-20, 60-6B-1 through 60-6B-18, 60-6C-1 through 60-6C-9, 60-7A-1 through 60-7A-25, 60-7B-1 through 60-7B-11, 60-8A-1 through 60-8A-19 (Repl. Pamp. 1981 and Cum. Supp. 1982). The Act has become known as the "price affirmation law."

IV. Whether the Act is in violation of the police powers of New Mexico.

FACTS

The Act was originally passed in 1967 and applied to the sale of "alcoholic liquor" as defined in the Liquor Control Act, which excluded brewed products. The prohibition under the Act was that no brand of "alcoholic liquor" could be sold by manufacturers to New Mexico liquor wholesalers (Wholesalers) at any price lhigher [sic] than the price sold to any other liquor wholesaler anywhere in the United States or District of Columbia.

During the 1979 legislative session, House Bill 278 was enacted as 1979 N.M. Laws, Ch. 83, and specifically read:

> AN ACT RELATING TO ALCOHOLIC LIQUORS; AMENDING THE DISCRIMINATION IN SELLING ACT.
>
> BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:
>
> Section 1. Section 60-12-2 NMSA 1978 (being Laws 1967, Chapter 269, Section 2) is amended to read:
>
> "60-12-2. FILING OF SCHEDULES REQUIRED.—No brand of alcoholic liquor shall be sold to or purchased by a wholesaler, irrespective of the place of sale or delivery, unless a schedule is filed with the director of the department of alcoholic beverage control and is then in effect. For the purposes of the Discrimination in Selling Act, "alcoholic liquor" means alcoholic liquor as defined in Section 60-3-1 NMSA 1978."

The effect of this amendment was to extend the price affirmation law to brewed products which had previously been excluded under the definition of "alcoholic liquor."

I. SUBJECT OF THE AMENDMENT

Brewers claim that the purpose and effect of the amendatory language of House Bill 278 were concealed from the Legislature, the administration and those affected by the law. Therefore, Brewers argue that House Bill 278 failed to comply with the mandatory notice requirements of N.M. Const. art. 4, Sections 16 and 18. We disagree.

Section 16 provides in pertinent part:

> The subject of every bill shall be clearly expressed in its title . . . but if any subject is embraced in any act which is not expressed in its title, only so much of the act as is not so expressed shall be void. . .

Section 18 provides in pertinent part:

> No law shall be revised or amended, or the provisions thereof extended by reference to its title only; but each section thereof as revised, or extended shall be set out in full. . . .

(a) *Legislative intent*

In an attempt to show legislative intent, Brewers introduced affidavits at trial from chairmen of legislative committees claiming that they did not know the effect of House Bill 278, and that if they would have known the effect of House Bill 278, then they would have held hearings. The propriety of admitting a legislator's testimony to determine legislative intent was addressed in *State v. Turley*, 96 N.M. 592, 633 P.2d 700 (Ct. App. 1980), *rev'd*, 96 N.M. 579, 633 P.2d 687 (1981). The Court of Appeals' opinion held that "a legislator's testimony, either as committee member or legislative member, generally is not competent evidence as to the intent of the legislative body enacting a measure." *Id.* at 597, 633 P.2d 705 (citations omitted). However, we then overruled the Court of Appeals' opinion and found that "there [was] insufficient evidence in the record upon which the Court of Appeals could predicate a general principle of law that a legislator's testimony is not competent evidence as to the intent of the legislative body enacting a measure. . . ." *Id.* at 581, 633 P.2d at 689.

We now agree with the statement by the Oklahoma Supreme Court in *Haynes v. Caporal*, 571 P.2d 430, 434 (Okl. 1977) (citations omitted) (emphasis added), referred to by the Court of Appeals in *Turley*, that:

> At trial, legislative intent . . . was sought to be established through the testimony of an individual senator and house member at the time of [the bill's] passage. *This court is not bound, and need not consider such evidence. Testimony of individual legislators or others as to happenings in the Legislature is incompetent, since that body speaks solely through its concerted action as shown by its vote.*

Similarly, as addressed in Annot., 70 A.L.R. 5 (1931), in determining legislature [sic] intent it is proper to look to the legislative history of an act or contemporaneous statements of legislators while the legislation was in the process of enactment. Statements of legislators, *after* the passage of the legislation, however, are generally not considered competent evidence to determine the intent of the legislative body enacting a measure. *See e.g., County of Washington, Oregon v. Gunther*, 452 U.S. 161, 176 n.16 (1981); *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 354 N.39 (1977); *see also* Annot. 56 L.Ed.2d 918 (1979).

In New Mexico, legislative intent must be determined primarily by the *legislation itself*. *State v. McHorse*, 85 N.M. 753, 517 P.2d 75 (Ct. App. 1973); *Santa Fe Downs, Inc. v. Bureau of Revenue*, 85 N.M. 115, 509 P.2d 882 (Ct. App. 1973). Therefore, we adopt the Court of Appeals' reasoning and holding in *Turley*. To the extent that our opinion in *Turley* may be construed as inconsistent with this holding, our opinion is expressly overruled.

(b) *Constitutionality*

We have long held that the test of a statute's constitutional validity under Section 16 is whether the title fairly gives such reasonable notice of the subject matter of the statute itself as to prevent the mischief intended to be guarded against. *State v. Ingalls*, 18 N.M. 211, 135 P.1177 (1913). The mischief, which

is to be guarded against, is "hodge-podge or log-rolling legislation, surprise or fraud on the legislature, or not fairly apprising the people of the subjects of legislation so that they would have no opportunity to be heard on the subject." *Martinez v. Jaramillo,* 86 N.M. 506, 508, 525 P.2d 866, 868 (1974) (citations omitted). When applying this test on appeal, we will indulge every presumption in favor of the legislation validity. *Id.* Furthermore, each case must be decided on its own facts and circumstances. *State v. Gomez,* 34 N.M. 250, 280 P. 251 (1929).

As a result of previous rulings by this Court, the Legislature has made it a policy to insure that the title of an act is stated in broad terms. *See e.g. Bureau of Revenue v. Dale J. Bellamah Corp.,* 82 N.M. 13, 474 P.2d 499 (1970); *First Thrift and Loan Association v. State,* 62 N.M. 61, 304 P.2d 582 (1956). The title, however, need not set forth details of an enactment. *City of Albuquerque v. Garcia,* 84 N.M. 776, 508 P.2d 585 (1973). If the subject matter of the bill is reasonably germane to the title of the act, it is sufficient to be valid under Section 16. *In re Investigation No. 2 of the Governor's Organized Crime Prevention Commission,* 91 N.M. 516, 577 P.2d 414 (1978); *see also State ex rel. Salazar v. Humble Oil & Refining Co.,* 55 N.M. 395, 234 P.2d 339 (1951). Likewise, we have held that the fact that an act may amend certain provisions of other statutes by implication, does not in and of itself violate Section 18. *State ex rel. Taylor v. Mirabal,* 33 N.M. 553, 273 P.928 (1928).

In the present case, House Bill 278 was very simple. It consisted of two paragraphs on one page and made two changes to the Act. The first change was to substitute the name of the person with whom reports must be filed from the "chief of the liquor division" to the "director of the department of alcoholic beverage control." The second change was to alter the definition of "alcoholic liquor" from "Spiritous Liquor" to "alcoholic liquor" as defined in the Act. The effect of this change clearly was to make brewed products subject to the Act, just as other alcoholic beverages had been previously. Having

reviewed House Bill 278, we determine that its title did not fail to give reasonable notice of the subject matter of the amendment. The title does not violate Section 16. Furthermore, we determine that the amendment's reference to the definitions in NMSA 1978, Section 60-3-1,[2] does not violate Section 18. We therefore hold that House Bill 278 was sufficient to meet our constitutional standards.

II. UNDUE BURDEN ON INTERSTATE COMMERCE

Brewers claim that the trial court erred in granting summary judgment against them because the application of the Act imposed an undue interference with interstate commerce in violation of Article 1, Section 8, Clause 3 of the United States Constitution. For example, Brewers assert that strong competition in various regions of the country will require them to cut prices to meet competition in those regions. To require them to cut prices across the country to meet regional competition would result in an unreasonable burden on interstate commerce. Brewers also claim that the Act, in effect, would require all brewers to adopt an FOB (free on board) pricing system and that they would not be allowed to charge a "delivered price". The Act would increase prices to wholesalers, retailers and consumers in transshipped states since it forbids price reduction based on increased freight. It also would prohibit the discounting of distressed beer which must be sold before the shelf life affects its quality. Therefore, Brewers argue that the effect of the law is extra-territorial and burdens interstate commerce between the transshipping and the transshipped states, and that the trial court improperly granted summary judgment on the issue of whether the Act imposes an unreasonable burden on interstate commerce. We disagree.

The Twenty-first Amendment to the United States Constitution grants each state broad regulatory power over liquor traffic within its borders. *United States v. Frankfort Distilleries, Inc.*, 324 U.S. 293 (1945). Although the Twenty-first Amend-

2. Presently compiled as NMSA 1978, Section 60-3A-3 (Repl. Pamp. 1981).

ment does not overrule the Constitution's Commerce Clause, "each must be considered in the light of the other, and in the context of the issues and interests at stake in any *concrete case.*" *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 332 (1964) (emphasis added).

In granting summary judgment, the trial court followed the reasoning in the United States Supreme Court case of *Joseph E. Seagram & Sons v. Hostetter, Chairman, New York State Liquor Authority*, 384 U.S. 35 (1966.)[3] In *Seagram*, after reviewing constitutional arguments comparable to the constitutional challenge raised by Brewers, the Court rejected a facial attack upon Section 9 of New York's Alcoholic Beverage Control Law (New York's Section 9). A comparison of New York's Section 9 and the Act indicates an indistinguishable price affirmation setting. Both require wholesalers and retailers to file monthly price schedules with the respective state liquor authority accompanied by an affirmation that prices charged are no higher than the lowest price at which sales are made anywhere in the United States during the preceding month.

In considering a Commerce Clause attack, the Court held that under the Twenty-first Amendment this particular method of regulation was valid on its face and *not* an unconstitutional burden on interstate commerce since the enforcement of the price affirmation law was stayed throughout the litigation. Specifically on the Commerce Clause argument, the Court reiterated its previous position that " 'a State is totally unconfined by traditional Commerce Clause limitation when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders.' " *Seagram*, 384 U.S. at 42 (quoting *Idlewild*, 377 U.S. at 330 (1964)). The Court therefore determined that in relationship to the Com-

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3. New York's Price affirmation law initially was upheld constitutionally by the New York Supreme Court, Albany County, 45 Misc.2d 956, 258 N.Y.S.2d 442 (1965); then affirmed by the New York Supreme Court, Appellate Division, Third Judicial Department, 23 A.D.2d 933, 259 N.Y.S.2d 644 (1965); and thereafter affirmed by the Court of Appeal of New York, 16 N.Y.2d 47, 209 N.E.2d 701 (1965), before review was granted by the United States Supreme Court.

merce Clause, nothing in previous cases decided under Commerce Clause analysis would require a ruling that the New York's Section 9 was unconstitutional.

In the more recent case of *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980) (citation omitted) (emphasis added), the Court relied on the *Idlewild* concept of a "concrete case" and stated:

> The Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system. Although states retain substantial discretion to establish other liquor regulations, those controls may be subject to the federal commerce power in appropriate situations. *The competing state and federal interests can be reconciled only after careful scrutiny of those concerns in a 'concrete case.'*

The present case is not a "concrete case" because the enforcement of the Act and House Bill 278 with respect to Brewers was enjoined throughout the litigation. Application of appropriate Commerce Clause analysis would be too speculative. While a statute that is constitutional on its face can be unconstitutional in its application, we find that in the present case the trial court properly granted summary judgment. Therefore, we agree with the trial court's reading of *Seagram* that on its face the Act does not impose an unreasonable burden on interstate commerce.

III. ANTITRUST LAWS

Brewers argue that the Act requires them to engage in price discrimination and to establish interstate price-fixing in violation of federal antitrust laws, specifically the Sherman Act, 15 U.S.C. Sections 1 through 7 (1976), and the Robinson-Patman Act, 15 U.S.C. Section 13 (1976). We disagree.

The United States Supreme Court in *Seagram* specifically found no concerted anticompetitive conduct required for violation of federal antitrust laws. The Court stated:

> The bare compilation, without more, of price information on sales to wholesalers and retailers to support the affirmations filed with the State Liquor Authority would not of itself violate the Sherman Act. . . . Section 9 imposes no irresistable economic pressure on the appellants to violate the Sherman Act in order to comply with the requirements of §9. On the contrary, §9 appears firmly anchored to the assumption that the Sherman Act will deter any attempts by the appellants to preserve their New York price level by conspiring to raise the prices at which liquor is sold elsewhere in the country.

Although it is possible to envision circumstances under which price discriminations proscribed by the Robinson-Patman Act might be compelled by § 9, the existence of such potential conflicts is entirely *too speculative* in the present posture of this case . . . .

Id. at 45-46 (citations omitted) (emphasis added).

More recently, the United States Supreme Court again reviewed whether an alcoholic beverage control law violated federal antitrust laws and relied heavily on the *Seagram* case as authority in deciding *Rice v. Norman Williams Co.*, U.S. , 102 S.Ct. 3294, 73 L.Ed.2d 1042 (1982). In *Rice* the Court stated that:

> In determining whether the Sherman Act preempts a state statute, we apply principles similar to those which we employ in considering whether any state statute is preempted by a federal statute pursuant to the Supremacy Clause. As in the typical preemption case, the inquiry is whether there exists on irreconcilable conflict between the federal and state regulatory schemes. The existence of a hypothetical or potential conflict is insufficient to warrant the preemption of the state statute. *A state regulatory scheme is not preempted by the federal antitrust laws simply because in a hypothetical situation a private party's compliance with the statute might cause him to violate the antitrust laws. A state statute is not preempted by the*

federal antitrust laws simply because the state scheme might have an anticompetitive effect . . . .

A party may successfully enjoin the enforcement of a state statute only if the statute on its face irreconcilably conflicts with federal antitrust policy.

Id. at , 102 S.Ct. at 3299, 73 L.Ed. 2d at 1049-1050 (citations omitted) (emphasis added). The Court thereafter held that:

> Our decisions in this area instruct us, therefore, that a state statute, when considered in the abstract, may be condemned under the antitrust laws only if it mandates or authorizes conduct that necessarily constitutes a violation of the antitrust laws in all cases, or if it places irresistible pressure on a private party to violate the antitrust laws in order to comply with the statute. Such condemnation will follow under § 1 of the Sherman Act when the conduct contemplated by the statute is in all cases a *per se* violation. If the activity addressed by the statute does not fall into that category, and therefore must be analyzed under the rule of reason, the statute cannot be condemned in the abstract. Analysis under the rule of reason requires an examination of the circumstances underlying a particular economic practice, and therefore does not lend itself to a conclusion that a statute is facially inconsistent with federal antitrust laws.

Rice, U.S. at , 102 S.Ct. at 3300, 73 L.Ed.2d at 1051.

Inasmuch as no material distinction exists between New York's Section 9 and the Act, we determine that the holdings in *Seagram* and *Rice* are controlling and that it is unnecessary for us to engage in the hypotheticals presented by Brewers on this point. A statute dealing with the regulation of alcoholic beverages, such as the price affirmation law presented in this case, cannot be constitutionally condemned in the abstract. If legislation is not a "*per se* violation" of federal antitrust laws, we will not engage in constitutional analysis unless and until a

"concrete case" is engendered from a specific application of the legislation. In other words, if legislation is constitutional on its face, then it will remain constitutional until such time as there is specific enforcement experience that will give us a body of historical facts upon which we can base a proper judgment, as opposed to an inappropriate decision based on hypotheticals, assumed facts or potential conflicts. *Rice v. Norman Williams, Co.; California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.; Joseph E. Seagram & Sons v. Hostetter, Chairman New York State Liquor Authority.*

IV. STATE'S POLICE POWER

Brewers claim that the trial court erred in denying them an opportunity to prove that the statutory scheme of the Act had the effect of dictating price-fixing, without any substantial relation to the public health, safety or general welfare. Brewers therefore argue that the Act amounts to a preferential price-fixing scheme which is an improper exercise of New Mexico's police power in violation of N.M. Const. art. 2, Section 4 and 18. We disagree.

Section 4 provides in pertinent part:

> All persons . . . have certain natural, inherent and inalienable rights, among which are the rights of enjoying and defending life and liberty, of acquiring, possessing and protecting property . . . .

Section 18 provides in pertinent part:

> No person shall be deprived of life, liberty or property without due process of law; nor shall any person be denied equal protection of the laws . . . .

We have held that if the manufacture and sale of liquor is lawful, then statutes which provide for the regulation of the business are limited by constitutional guarantees and must fall within the proper exercise of New Mexico's police power. *Drink, Inc. v. BAbcock,* 77 N.M. 277, 421 P.2d 798 (1966). [sic] In determining whether a statute amounts to a proper

exercise of police power, courts must indulge every presumption in favor of the validity of the legislation. "[T]he state may adopt an economic policy reasonably deemed to promote the public welfare, and may enforce such a policy by appropriate legislation without contravening due process so long as such legislation has a reasonable relation to a proper legislative purpose and is neither arbitrary nor discriminatory." *Id.* at 280, 421 P.2d at 800 (citation omitted).

The legislation reviewed in *Drink, Inc.*, specifically delegated and permitted manufacturers the power to contractually fix the minimum price for their product at the retail level. In *Drink, Inc.*, we held that the fair-trade contract and markup provisions of the Liquor Control Act constituted unreasonable legislation, and was not an appropriate exercise of New Mexico's police power. In so holding, we stated:

> We want to make it clear that the legislature has the power to act on the subject of below-cost sales and their effect on free competition, and may adopt legislation relating to the establishing of prices on alcoholic beverages with the view and purpose of regulating and controlling the liquor business in the interest of the public welfare. ***We are here only concerned with the fair-trade contract and mandatory uniform markup provisions discussed. The police power was not validly exercised in the enactment of these specific provisions.***

Id at 284, 421 P.2d at 803 (emphasis added).

In marked contrast, the Act does not permit Brewers to establish the minimum wholesale or retail prices of their beer through "non-signor" or "vertical agreements" provisions as was the case in *Drink, Inc.* Instead, the Act requires Brewers to sell their products to Wholesalers at a price "no higher than the lowest price at which such item of liquor was sold by the brand owner, or any related person, to any wholesaler anywhere in any other state of the United States or in the District of Columbia, or to any state agency which owns and operates

retail liquor stores" during the immediate preceding calendar month. NMSA 1978, § 60-12-6.[4]

In reviewing a comparable constitutional argument, the United States Supreme Court in *Seagram* specifically rejected assertions that New York's Section 9 violated due process and equal protection clauses of the Fourteenth Amendment. The Court stated:

> We cannot say that the legislature acted unconstitutionally when it determined that only by imposing the relatively drastic 'no higher than the lowest price' requirement of § 9 could the grip of the liquor distillers on New York liquor prices be loosened. (Footnote omitted.) In a variety of cases in areas no more sensitive than that of liquor control, this Court has upheld state maximum price legislation.

Id. at 48 (citations omitted). By virtue of the Twenty-first Amendment, the states have been conferred with something more than a nominal degree of authority over public health, welfare and morals when they act to regulate the liquor business. In light of this authority, the Act is neither arbitrary nor discriminatory. Therefore, we held that the Act does not violate the police powers of New Mexico.

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4. Presently compiled as NMSA 1978, Section 60-8A-15 (Repl. Pamp. 1981).

CONCLUSION

We determine that the trial court did not err in deciding that no genuine issues of fact exist because the enactment of House Bill 278 satisfies constitutional requirements, and because the Act, as amended, is constitutionally valid on its face. The United States Supreme Court cases of *Rice*, *Midcal*, *Seagram* and *Idlewild* are controlling dispositive of the specific constitutional challenges raised by Brewers. On remand, the trial court shall determine the Wholesalers' appropriate shares of the bonds posted by Brewers. Brewers, however, are not precluded from bringing a future action upon the showing that its case has become "concrete", henceforth from this determination.

The trial court's entry of summary judgment is affirmed. This case is remanded to the trial court for proceedings not inconsistent with this opinion.

IT IS SO ORDERED.

s// WILLIAM RIORDAN
WILLIAM RIORDAN, *Justice*

WE CONCUR:

s// WILLIAM R. FEDERICI
WILLIAM R. FEDERICI, *Justice*

s// THOMAS A. DONNELLY
THOMAS A. DONNELLY, *Judge, sitting by designation.*

IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO

UNITED STATES BREWERS ASSOCIATION, INC., ADOLPH COORS COMPANY, STROH BREWERY COMPANY, F & M SCHAEFER BREWING COMPANY, ANHEUSER-BUSCH, INC., MILLER BREWING COMPANY, OLYMPIA BREWING COMPANY, G. HEILEMAN BREWING COMPANY and PABST BREWING COMPANY,
Plaintiffs-Appellants.

and

No. 13,053

THE GUINNESS-HARP CORPORATION,
Plaintiff-in-Intervention, Appellants,

vs.

JIM BACA, Director of the New Mexico Department of Alcoholic Beverage Control,
Defendant-Appellee

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that United States Brewers Association, Inc., Adolph Coors Company, Stroh Brewery Company, F & M Schaefer Brewing Company, Anheuser-Busch, Inc., Miller Brewing Company, and G. Heileman Brewing Company, appellants above-named, hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of New Mexico entered on July 21, 1983 affirming the granting of summary judgment in favor of appellee on the complaint herein.

This appeal is taken pursuant to 28 U.S.C. 1257(2).

RODEY, DICKASON, SLOAN,
AKIN & ROBB, P.A.

By s// WILLIAM S. DIXON
WILLIAM S. DIXON
Attorneys for
Plaintiff-Appellant
Miller Brewing Company
Post Office Box 1888
Albuquerque,
New Mexico 87103
Telephone: (505) 765-5900

FREEDMAN, BOYD & DANIELS,
P.A.

By s// CHARLES W. DANIELS
CHARLES W. DANIELS
Attorneys for
Plaintiff-Appellants
United States Brewers Association, Inc., Adolph Coors Company, Stroh Brewery Company, F & M Schaefer Brewing Company, Anheuser-Busch Inc., Olympia Brewing Company, G. Heileman Brewing Company and The Guinness-Harp Corporation
20 First Plaza, Suite 212
Albuquerque,
New Mexico 87102
Telephone: (505) 842-9960

Supreme Court of the United States

No. A-246

UNITED STATES BREWERS ASSOCIATION, INC., *et al.*,
Appellants.

v.

JIM BACA, DIRECTOR OF THE NEW MEXICO
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL

ORDER

UPON CONSIDERATION of the application of counsel for the appellants,

IT IS ORDERED that the time for docketing an appeal in the above-entitled cause be, and the same is hereby, extended to and including November 21, 1983.

/s/ BYRON R. WHITE
Associate Justice of the
Supreme Court of
the United States

Dated this 8th
day of October, 1983

Supreme Court of the United States

No. A-246

UNITED STATES BREWERS ASSOCIATION, INC., *et al.*,
Appellants,

v.

JIM BACA, DIRECTOR OF THE NEW MEXICO
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL

ORDER

UPON FURTHER CONSIDERATION of the application of counsel for the appellants,

IT IS ORDERED that the time for docketing an appeal in the above-entitled cause be, and the same is hereby further extended to and including December 5, 1983.

/s/ BYRON R. WHITE
Associate Justice of the
Supreme Court of
the United States

Dated this 10th
day of November, 1983

SEE COMPANION CASE